

Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of) MM Docket No. 93-316
)
Amendment of Section 73.202(b),) RM-8403
Table of Allotments,)
FM Broadcast Stations,)
(Douglas, Tifton and Unionville, Georgia))

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To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
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PETITION FOR RECONSIDERATION

Tifton Broadcasting Corporation ("TBC"), by and through counsel, and pursuant to §1.429 of the Commission's Rules (47 C.F.R. §1.429), hereby submits its Petition For Reconsideration of the Commission's Report and Order, DA 95-1513, released July 17, 1995 ("R&O"), in the above-captioned proceeding.¹ In support whereof, the following is shown:

Background

1. This proceeding concerns the proposal of Orchon Media, Inc. ("Orchon"), permittee of WKZZ(FM), Douglas, Georgia, to upgrade Channel 223A at Douglas, Georgia, to Channel 223C3 and then reallocate Channel 223C3 to Tifton, Georgia. Orchon originally proposed to reallocate Channel 223C3 to Unionville, Georgia, but that

¹ The Report and Order was published in the Federal Register on July 21, 1995. See 60 FR 37597. Pursuant to §1.429 and §1.4(b) of the Commission's rules, this Petition is timely filed within thirty days of the publication of the Report and Order, in the Federal Register or by August 21, 1995 (August 20, 1995, a Sunday, was a Commission "holiday").

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proposal was obviously defective since Unionville did not qualify as a "community" for allotment purposes.

2. In its Report and Order, the Commission granted Orchon's proposal finding that reallocation of Channel 223C3 from Douglas to Tifton "is in the public interest." R&O at ¶8. While the Commission briefly mentioned the arguments raised by TBC against Orchon's proposed reallocation, the Commission failed to give a reasoned explanation for why it rejected TBC's arguments. Instead, the Commission simply cited to its policy concerning modifications of FM authorizations, Modification of TV and FM Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989)(subsequent history omitted). The Commission ignored the important public interest arguments raised by TBC. Had the Commission given proper consideration to these arguments, it would have concluded that the reallocation of Channel 223C3 from Douglas, Georgia, will not serve the public interest.

**The Commission Erred By Finding That Orchon's
Proposal Would Serve the Public Interest**

3. It is obvious from its actions in this proceeding that Orchon is using the Commission's rulemaking processes for no other reason than to find a community that will serve its engineering needs. Orchon, apparently with no interest in serving the community of Tifton, Georgia, seems to have specified this community in order to secure for itself an engineering upgrade. As TBC has previously demonstrated, Orchon cannot upgrade its station from its proposed tower site near Tifton, Georgia, and provide the required city grade coverage to the community of Douglas. See TBC's Reply Comments, at ¶3. Therefore, it appears that Orchon has gone "community shopping," to find a Georgia community that would fit its needs. Its first

choice, Unionville, Georgia, would have failed to meet the Commission's test for "community" status. Therefore, Orchon chose Tifton, since that community has already qualified for an FM allotment. However, there is no evidence that Orchon is serious about serving the citizens of Tifton, Georgia. To grant Orchon's proposal would be to permit an FM permittee to abandon Douglas for no reason other than to suit its own personal business needs. Such a proposal does not serve the public interest.

4. The proposed reallocation of Channel 223C3 to Tifton ranks at the bottom of the Commission FM allotment priorities. See, Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 [51 RR 2d 807] (1982). The proposed reallocation would not result in either first or second aural service, or first local full-time service to the community of Tifton and therefore, Orchon's proposal falls under the last priority, priority four, "other public interest matters." Id. As such, the Commission should have scrutinized Orchon's proposal more closely and required a stronger showing that the reallocation of Channel 223C3 to Tifton would serve the public interest. The Commission has recognized that by allowing FM licensees/permittees to rely on the fourth allotment priority to support a proposed FM reallocation it may be providing too much flexibility to licensees and permittees seeking changes of community. Modification of TV and FM Authorizations, 5 FCC Rcd 7094, 7096 (1990). In such cases, the Commission has stated that it "will adopt the proposal which best discharges the Commission's statutory mandate (encompassed in §307(b) of the Communications Act of 1934, as amended)." Id. Orchon failed to show how the reallocation of Channel 223C3 to Tifton would result in a more preferential

arrangement of allotments as required by §307(b). For example, Orchon has never shown why it is necessary for Channel 223C3 to be reallocated to Tifton, Georgia, or how such an allotment will serve the public interest. There is no evidence that Orchon would be precluded from upgrading its FM station on Channel 223C3 at Douglas. It appears that the only impediment to upgrade WKZZ(FM) is Orchon's private, business desire to specify a tower site near Tifton, Georgia.

5. To support its ultimate finding that Orchon's proposal would serve the public interest, the Commission merely focused on the potential gain of service versus potential loss of service that would result if Channel 223C3 was reallocated to Tifton, Georgia. See R&O at ¶8. However, the Commission's comparison is flawed. Instead of considering the potential loss of service that would result if Channel 223A were removed from Douglas, the Commission should have considered the loss of service that would have resulted if an upgraded Channel 223C3 were removed from Douglas. The more accurate comparison, and one that the Commission never considered, should have been between Channel 223C3 at either Douglas or Tifton. Not surprisingly, Orchon never made such a comparison. Had the Commission insisted upon such a showing, it would have found that retaining Channel 223C3 at Douglas would have better served the public interest. Instead, the Commission permitted Orchon to make a straw man comparison between Channel 223A at Douglas and Channel 223C3 at Tifton. Such a comparison did not provide a valid justification for granting Orchon's proposal. The Commission should reconsider its decision in this case and find that Orchon's proposal would not result in a preferential arrangement of allotments and would not serve the public interest.


Conclusion

6. The Commission ignored the important arguments raised by TBC in this proceeding. The Commission should fully reconsider the important public policy issues raised by TBC and find that Orchon has not met the burden of demonstrating that reallocation of Channel 223C3 to Tifton, Georgia, would serve the public interest.

WHEREFORE, the above facts considered, Tifton Broadcasting Corporation, respectfully requests that the Commission reconsider its Report and Order in this proceeding and deny the rulemaking proposal of Orchon Media, Inc., to reallocate Channel 223C3 to Tifton, Georgia.²

Respectfully submitted,

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² Pursuant to §1.420(f) of the Commission's Rules the effectiveness of the Commission's Report and Order is automatically stayed pending resolution of this Petition. In MM Docket No. 95-110, the Commission is considering retroactively eliminating the automatic stay provision contained in §1.420(f). See, Notice of Proposed Rulemaking, MM Docket No. 95-110, FCC 95-277, released July 21, 1995. Should the Commission eliminate the automatic stay provision and retroactively lift the stay in this proceeding, TBC reserves the right to seek a stay of the Commission's Report and Order.

CERTIFICATE OF SERVICE

I, Denise L. Felice, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 21st day of August, 1995, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

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